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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

Robert Masters, Individually And On  
Behalf Of All Others Similarly  
Situated,

Plaintiff,

v.

Avanir Pharmaceuticals, Inc., Keith A  
Katkin, Craig A. Wheeler, Corinne H.  
Nevinny, Dennis G. Podlesak, Hans E.  
Bishop, David J. Mazzo, and Scott M.  
Whitcup,

Defendants.

CASE NO. 8:14-cv-00053-CJC-RNB

**DEFENDANTS' MEMORANDUM  
OF POINTS AND AUTHORITIES  
IN OPPOSITION TO  
PLAINTIFF'S MOTION FOR  
PRELIMINARY INJUNCTION**

Date: February 10, 2014

Time: 1:30 p.m.

Place: Courtroom 9B

[Honorable Cormac J. Carney]

Complaint Filed: January 14, 2014

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1 **I. INTRODUCTION**

2 This is one of a series of seemingly obligatory attacks on executive  
 3 compensation during proxy season. This putative class action focuses on defendant  
 4 Avanir Pharmaceuticals, Inc.'s ("Avanir") new equity compensation plan ("2014  
 5 Plan") that is up for shareholder approval at the company's annual meeting on  
 6 February 12, 2014. Plaintiff criticizes the description of the 2014 Plan in Avanir's  
 7 2014 proxy statement ("2014 Proxy" or "Proxy"), which is contained in Proposal 4  
 8 to the Proxy. Then, by threatening an injunction immediately before the annual  
 9 meeting, plaintiff hopes that the company will make a few immaterial changes to  
 10 the Proxy and handsomely compensate his attorney, rather than risk a delay in the  
 11 vote. However, there is no problem with the Proxy's disclosures and the company  
 12 will not be shaken down. Avanir respectfully asks the Court to allow all of the  
 13 shareholders to vote at the upcoming meeting and let the majority decide the fate of  
 14 the 2014 Plan, and not just a single shareholder, who owns less than one one-  
 15 hundredth of a percent of Avanir's 152 million outstanding shares.

16 Plaintiff cannot make the required showing for emergency injunctive relief.  
 17 First and foremost, Avanir's description of the 2014 Plan is detailed, complete, and  
 18 fully complies with all legal requirements. Further, enjoining the vote would  
 19 confuse Avanir's shareholders by flooding them with useless information,  
 20 jeopardize Avanir's operations, and serve no meaningful purpose. Pertinent here,  
 21 plaintiff stands alone in finding problems with the Proxy's disclosures. No other  
 22 shareholders have come forward to join him in this lawsuit, and of the votes cast  
 23 thus far, upwards of 90% have *supported* the 2014 Plan. Moreover, the country's  
 24 two principal proxy advisory services, Institutional Shareholder Services ("ISS")  
 25 and Glass Lewis & Co. ("Glass Lewis"), have supported the 2014 Plan and have  
 26 not objected to the disclosures. To assist the Court, Avanir has submitted the expert  
 27 opinion of Stanford Law Professor Robert Daines, who believes the proposed  
 28 disclosures to be immaterial and of no use to investors.

## II. BACKGROUND

### A. THE PARTIES

Avanir, a corporation organized under the laws of Delaware and headquartered in Aliso Viejo, is a pharmaceutical company that acquires, develops, and commercializes therapeutic products for the treatment of central nervous system disorders. Class Action Complaint (“Compl.”), Dkt No. 1, Jan. 14, 2014, ¶ 11. The company currently has approximately 152 million shares of common stock outstanding. *Id.* ¶ 22. The individual defendants include all of the members of Avanir’s board of directors (the “Board”) as of the date the complaint was filed. *Id.* ¶¶ 12-18. Plaintiff alleges that he is an Avanir shareholder. *Id.* ¶ 10. He claims to own 0.007% of Avanir’s stock. *See* Certification of Named Plaintiff Robert Masters, Dkt. No. 5, Jan. 17, 2014, ¶ 4.

### B. AVANIR’S 2005 STOCK INCENTIVE PLAN

Like many publicly-held companies, Avanir maintains equity incentive plans to attract and retain qualified employees, and to align their interests with those of the company’s shareholders. According to the Proxy, Avanir’s equity awards are important to incentivize its employees to remain with the company, to motivate them to help attain corporate objectives, and to align employees’ interests with those of stockholders. Declaration of Christine G. Ocampo in Support of Defendants’ Opposition to Plaintiff’s Motion for Preliminary Injunction (“Ocampo Decl.”), filed herewith, Ex. H [2014 Proxy] at 12.

At present, Avanir has one existing plan from which equity compensation may be granted, the 2005 Equity Incentive Plan (“2005 Plan”). 2014 Proxy at 12. The 2005 Plan, which Avanir’s shareholders approved in March 2005, *see* 2014 Proxy at 13, allows Avanir to grant non-statutory stock options, stock appreciation rights, stock awards, and cash-based incentive awards to employees, directors, and consultants. Each year, Avanir files with the SEC an annual report on Form 10-K, disclosing the number of shares issued under the 2005 Plan. Declaration of Robert



1 M. Daines in Support of Defendants' Opposition to Plaintiff's Motion for  
 2 Preliminary Injunction ("Daines Decl."), filed herewith, ¶ 22 tbl. 1.

3 As of December 13, 2013, there remained 191,126 shares available for  
 4 issuance under the 2005 Plan. 2014 Proxy at 13. In each of fiscal years 2011,  
 5 2012, and 2013, Avanir issued approximately 3.2 million shares as equity awards.  
 6 *Id.* The Proxy states that the company currently does not have a sufficient number  
 7 of remaining shares available under the 2005 Plan to compensate its employees in  
 8 line with past practice. Ocampo Decl. ¶ 24.

### 9 **C. PROPOSAL 4: THE PROPOSED 2014 PLAN**

10 On December 30, 2013, Avanir filed and distributed its Proxy, which seeks  
 11 shareholder approval of five proposals at the company's annual meeting on  
 12 February 12, 2014. 2014 Proxy at 2. Proposal 4, the only proposal at issue here,  
 13 would approve the 2014 Plan, and would increase the number of shares that Avanir  
 14 may issue in the future by 17 million shares. *Id.* at 13. According to Avanir, if  
 15 Proposal 4 is approved, the shares available under the 2014 Plan will last  
 16 approximately four years. *Id.* Pertinent here, if the 2014 Plan is not approved and  
 17 Avanir is unable to issue future equity awards, it may have to increase the cash  
 18 component of employees' compensation. Not only will this fail to align employee  
 19 interests with those of the shareholders, but it also would require that the company  
 20 allocate its crucial cash reserves to its compensation programs to remain  
 21 competitive in compensating its employees while seeking to reach profitability.

### 22 **D. THE LITIGATION AND PLAINTIFF'S REQUEST FOR** 23 **INJUNCTION**

24 On January 7, 2014, plaintiff's counsel sent a letter to Avanir demanding that  
 25 the company amend its Proxy to include additional disclosures relating to Proposal  
 26 4 and threatening to enjoin the shareholder vote if Avanir did not capitulate to his  
 27 demands. Plaintiff filed this case on January 14, 2014, and six days later moved for  
 28 a preliminary injunction. *See* Plaintiff's Memorandum in Support of Motion for

1 Preliminary Injunction (“Pl. Mem.”), Dkt. No. 6, Jan. 20, 2014.

### 2 **III. ARGUMENT**

#### 3 **A. STANDARD FOR ISSUANCE OF AN INJUNCTION**

4 “[A] preliminary injunction is an extraordinary and drastic remedy, one that  
5 should not be granted unless the movant, *by a clear showing*, carries the burden of  
6 persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972, 138 L. Ed. 2d 162, 117 S.  
7 Ct. 1865, 1867 (1997) (*per curiam*) (internal quotations omitted; emphasis in  
8 original). A party seeking a preliminary injunction must clearly demonstrate each  
9 of the following: (1) that he is likely to succeed on the merits; (2) that he is likely to  
10 suffer irreparable harm in the absence of preliminary relief; (3) that the balance of  
11 equities tips in his favor; and (4) that an injunction is in the public interest. Where  
12 the party seeking a preliminary injunction fails to satisfy any of these factors, the  
13 preliminary injunction must be denied.<sup>1</sup> *Winter v. Nat’l Res. Def. Council Inc.*, 555  
14 U.S. 7, 20, 172 L. Ed. 2d 249, 129 S. Ct. 365, 374 (2008). Irreparable harm and  
15 likelihood of success are weighed on a sliding scale; as the probability of success  
16 decreases, the moving party must demonstrate a higher degree of irreparable harm.  
17 *Global Horizons, Inc. v. U.S. Dept. of Labor*, 510 F.3d 1054, 1057-58 (9th Cir.  
18 2007).

#### 19 **B. PLAINTIFF FAILS TO ESTABLISH IRREPARABLE HARM**

##### 20 **1. The Propriety Of An Injunction Must Be Assessed On A** 21 **Case-By-Case Basis**

22 The Supreme Court has emphasized that categorical rules for issuing  
23 injunctions are inappropriate, *see eBay Inc. v. MercExchange, LLC*, 547 U.S. 388,

24 <sup>1</sup> Plaintiff argues that “Delaware substantive law applies to the underlying legal  
25 requirements of establishing an entitlement to injunctive relief,” but “it appears that  
26 the standard for the issuance of a preliminary injunction is similar, if not the same,  
27 under Delaware and California law.” Pl. Mem. at 9 n.3. This is incorrect. Federal  
28 law governs the standard plaintiff must meet to secure an injunction from a federal  
court. *Anselmo v. Mull*, No. Civ. 2:12-1422 WBS EFB, 2012 WL 5304799, at \*5-6  
(E.D. Cal. Oct. 25, 2012). Delaware law governs whether plaintiff has shown a  
likelihood of success on his state-law breach of fiduciary duty claim. *See id.*  
Federal law also governs whether he has shown a likelihood of success on his  
Section 14(a) claim. *Id.* California law is irrelevant to this analysis.

1 393-94, 164 L. Ed. 2d 641, 647, 126 S. Ct. 1837, 1840-41 (2006), and courts have  
 2 rejected plaintiff's attempt to equate a looming shareholder vote with irreparable  
 3 harm.<sup>2</sup> Two recent decisions have held that, *even in the merger context*, a  
 4 misleading proxy does not give rise necessarily to a showing of irreparable harm.  
 5 *Calleros v. FSI Int'l, Inc.*, 892 F. Supp. 2d 1163, 1172-73 (D. Minn. 2012) (denying  
 6 preliminary injunction for, *inter alia*, failure to show irreparable harm); *Louisiana*  
 7 *Mun. Police Emps.' Ret. Sys. v. Cont'l Res., Inc.*, 886 F. Supp. 2d 1255, 1267-68  
 8 (W.D. Okla. 2012) (same). Plaintiff must show, but has not shown, that the  
 9 shareholder vote at issue *in this case* will cause irreparable harm.

## 10 **2. A "Yes" Vote On Proposal 4 May Be Nullified**

11 If the shareholder vote proceeds on February 12 and the Court later  
 12 determines that the Proxy was so deficient as to invalidate the vote, irreparable  
 13 harm still does not result. The vote can be nullified and the company can issue  
 14 another proxy statement and schedule another vote on the incentive compensation  
 15 plan.

16 *Deborah G. Mallow IRA SEP Investment Plan v. McClendon*, Case No. CIV-  
 17 12-436-M, 2012 U.S. Dist. LEXIS 78479, at \*12 (W.D. Okla. June 6, 2012), is  
 18 instructive. There, the plaintiff sought to enjoin a shareholder vote on, *inter alia*, a  
 19 new incentive compensation plan. In denying injunctive relief for failure to  
 20 demonstrate irreparable harm, the court explained:

21 Plaintiffs are not attempting to enjoin a merger or other  
 22 corporate activity which would require the Court to  
 23 "unscramble the eggs" if preliminary injunctive relief  
 24 were erroneously withheld. As set forth above, the voting  
 25 items at issue do not involve complex business  
 transactions and if Plaintiffs ultimately demonstrate proxy

26 <sup>2</sup> *MONY Group Inc. v. Highfields Capital Management, L.P.*, 368 F.3d 138 (2d  
 27 Cir. 2004), on which plaintiff relies as an example of a court affirming an  
 28 injunction in a Section 14(a) case (Pl. Mem. at 16), specifically declined to adopt  
 the *per se* rule for injunctions in cases such as the one that plaintiff appears to  
 advocate here. 368 F.3d at 147. For reference, 15 U.S. Code § 78n ("Section  
 14(a)") is attached hereto as Appendix B.

violations, the Court can void the shareholders' vote on the voting items related to that material information and order that those voting items be resubmitted to the shareholders.

*Id.* This rationale applies equally to this case.<sup>3</sup>

## C. PLAINTIFF IS UNLIKELY TO PREVAIL ON THE MERITS

### 1. Plaintiff Misinterprets Section 162(m)<sup>4</sup>

Plaintiff alleges: (i) that the Proxy fails to disclose that the 2005 Plan is not in compliance with Section 162(m); (ii) that Proposal 4 is defective because it falsely represents to shareholders that approval of Proposal 4 is necessary for Avanir to continue benefitting from Section 162(m); (iii) that the Board fails to disclose any tax liability incurred as a result of the expiration of "shareholder approval" status for purposes of Section 162(m); (iv) that the Proxy fails to disclose why Avanir failed to seek re-approval of the performance goals under the 2005 Plan in 2011, 2012, or 2013; and (v) that the Proxy fails to state whether any performance awards paid to named executive officers under the 2005 Plan were tax deductible under Section 162(m). Plaintiff misconstrues both the facts and applicable law.

As an initial matter, plaintiff mischaracterizes Section 162(m) as a legal requirement. In truth, it is a permissive tax provision that allows Avanir to structure its compensation programs if it needs to reduce its tax liability. This argument improperly assumes that Avanir is required to issue tax deductible equity awards to its executives. To the contrary, Delaware law *does not require* a corporation to minimize its taxes. *Freedman v. Adams*, C.A. No. 4199-VCN, 2012 Del. Ch. LEXIS 74, at \*44-45 (Del. Ch. Mar. 30, 2012), *aff'd*, 58 A.3d 414 (Del.

<sup>3</sup> Nor would plaintiff suffer irreparable harm if his holdings are temporarily diluted between a successful shareholder vote and the date on which this Court ultimately decides whether the vote must be invalidated for proxy defects. Money damages may compensate for a dilution of shares. *See Calamore v. Juniper Networks, Inc.*, No. C07-01772, 2007 U.S. Dist. LEXIS 30653, at \*5 n.2 (N.D. Cal. Apr. 12, 2007) (dilution would not constitute irreparable harm, as it "would be remediable by money damages").

<sup>4</sup> For reference, 26 U.S. Code § 162(m) is attached hereto as Appendix A.

2013) (“[Plaintiff] contends that the Board had a duty to adopt a § 162(m) plan under its purported fiduciary duty to minimize taxes. Because the Court concludes there is no general fiduciary duty to minimize taxes, this argument fails.”).<sup>5</sup>

Plaintiff also misstates by omission the requirements imposed under Section 162(m) for corporations that elect to use the permissive tax provision. Under 26 U.S.C. § 162(m), a publicly-traded corporation is generally limited to deducting \$1 million in compensation paid to certain executives<sup>6</sup> (“covered executives”) in a tax year. I.R.S. Notice 2007-49, 2007-1 C.B. 1429. Compensation payable to a covered executive solely upon the attainment of one or more performance goals is not subject to the \$1 million limitation, provided that, *inter alia*, the performance goals are determined by a compensation committee and shareholders approve the material terms under which the performance compensation will be paid.<sup>7</sup> 26 U.S.C. § 162(m)(4)(C) (2011). For purposes of the foregoing, the “material terms” that must be approved by a corporation’s shareholders include: (i) the employees eligible to receive the compensation; (ii) a description of the business criteria on which the performance goal is based; and (iii) either the maximum amount of compensation that could be paid to any employee or the formula used to calculate the amount of compensation to be paid to the employee if the performance goal is attained. Treas. Reg. § 1.162-27(e)(4)(i); 26 C.F.R. § 1.162-27(e)(4)(i).<sup>8</sup> Once

<sup>5</sup> Moreover, plaintiff’s argument that the company has failed to take advantage of a tax-minimizing opportunity alleges harm, if any, to the company, and not to plaintiff. Such a claim would necessarily have to have been brought as a derivative action and comply with the requirements of Fed. R. Civ. P. 23.1, which plaintiff has failed to do.

<sup>6</sup> Generally, the company’s CEO and three highest compensated employees as of the end of a tax year, excluding the CEO and chief financial officer. *See* I.R.S. Notice 2007-49, 2007-1 C.B. 1429. A copy of I.R.S. Notice 2007-49 is attached as Exhibit B to the Declaration of Travis Biffar In Support of Defendants’ Brief in Opposition to Plaintiff’s Motion for Preliminary Injunction (“Biffar Decl.”).

<sup>7</sup> The compensation committee must be composed of two or more outside directors and must also certify performance before the compensation is paid. *See* 26 U.S.C. § 162(m)(4)(C).

<sup>8</sup> A copy of Section 1.162-27 of the Treasury Regulations issued by the United States Department of the Treasury, 26 C.F.R. §1.162-27, is attached to the Biffar Decl. as Exhibit A.

1 shareholders have approved the material terms of a performance goal, no additional  
2 disclosure or approval is required unless the compensation committee changes the  
3 material terms of a shareholder-approved performance goal. Additionally, if the  
4 compensation committee retains authority to change the targets under a  
5 shareholder-approved performance goal, shareholders must re-approve the material  
6 terms of the performance goal no later than the first shareholder meeting that occurs  
7 in the fifth year following the year in which the shareholders previously approved  
8 the performance goal. Treas. Reg. § 1.162-27(e)(4)(vi); 26 C.F.R. § 1.162-  
9 27(e)(4)(vi).

10 Finally, for purposes of Section 162(m), a stock option is deemed to  
11 constitute performance-based compensation if: (i) the option is granted by a  
12 corporation's compensation committee; (ii) the plan under which the option is  
13 granted states the maximum number of options that may be granted during a  
14 specified period to any employee; and (iii) the amount of compensation that the  
15 employee will receive under the option is based solely on an increase in the value of  
16 stock after the date of grant. Treas. Reg. § 1.162-27(e)(2)(vi); 26 C.F.R. § 1.162-  
17 27(e)(2)(vi).

18 To comply with the foregoing guidance, Avanir submitted the 2005 Plan to  
19 its shareholders in its 2005 Proxy and the proposal included terms designed to  
20 allow the company to grant stock options that are deductible under Section 162(m).  
21 *See Ocampo Decl., Ex. D [2005 Proxy] at 10* ("The 2005 Plan has been structured  
22 so that any compensation deemed paid in connection with the exercise of option  
23 grants made under that plan will qualify as performance-based compensation that  
24 *will not be subject to the \$1 million limitation.*") (emphasis added). Avanir  
25 amended the 2005 Plan in 2006 to increase the number of stock awards and  
26 restricted stock units that it may grant under the plan and submitted the amendment  
27 for shareholder approval. *Id.*, Ex. E at 7. Nothing in the 2006 Plan amendment  
28 impacted the shareholder-approved terms under which Avanir may grant stock



1 options under the 2005 Plan, and Avanir has not subsequently adopted any material  
2 amendments to the 2005 Plan.<sup>9</sup> *Id.* ¶ 13.

3 Based on governing tax guidance following shareholder approval of the 2005  
4 Plan, absent (i) a change to the material terms under which stock options may be  
5 granted under the plan or (ii) discretion by the Board's Compensation Committee  
6 (the "Committee") to change the performance goals under a stock option, *no further*  
7 *shareholder approval is required* for the Committee to continue granting stock  
8 options under the 2005 Plan during the entire term of the plan. Neither of these  
9 factors apply with respect to options granted under the 2005 Plan. First, there has  
10 been no change to the material terms approved by shareholders under which stock  
11 options may be granted under the plan. Second, the Committee does not retain  
12 discretion to change the performance goals with respect to option grants, because  
13 stock options granted under the plan increase in value only if Avanir's share price  
14 increases in value. Declaration of Jesus Varela in Support of Defendants'  
15 Opposition to Plaintiff's Motion for a Preliminary Injunction ("Varela Decl."), filed  
16 herewith, ¶ 3. In short, the Committee may continue granting stock options to  
17 Avanir's covered executives under the 2005 Plan and compensation associated with  
18 those stock options may qualify for deduction under Section 162(m).

19 As the Proxy notes, as of December 13, 2013, there remained 191,126 shares  
20 available for issuance under the 2005 Plan, which is set to expire by its terms in  
21 2015.<sup>10</sup> Avanir does not currently maintain any other equity incentive plan. 2014  
22 Proxy at 12. Given the low share reserve remaining under the company's current  
23 equity incentive plan and the short term remaining for that plan, shareholder

24 <sup>9</sup> Avanir amended the 2005 Plan in 2009 to reflect the company's change in  
25 reincorporation from California to Delaware. The amendment did not impact any  
of the substantive terms under the 2005 Plan. Ocampo Decl. ¶¶ 12-13.

26 <sup>10</sup> 2014 Proxy at 12-13. If the 2014 Plan is not approved, the 2005 Plan's share  
27 reserve would increase at the beginning of Avanir's 2015 fiscal year by a maximum  
28 of 325,000 shares under the annual evergreen provision (an automatic annual  
increase in the share reserve under the plan), which is disclosed to shareholders.  
*See id.* at 12. Avanir committed not to utilize this evergreen share increase if its  
shareholders approve the 2014 Plan. *Id.* at 13.

1 approval of the 2014 Plan is necessary for the company to continue granting tax-  
 2 deductible equity awards to its covered executives in the future.<sup>11</sup> For this reason,  
 3 the Proxy is neither misleading nor inaccurate when it states that “stockholder  
 4 approval of the 2014 Plan would preserve our ability to grant a range of tax-  
 5 efficient stock-based incentive awards under the 2014 Plan.” *Id.* at 13.

6 Plaintiff’s various allegations regarding the Proxy’s supposed failures to  
 7 disclose tax deductibility of compensation paid to covered executives and the tax  
 8 liabilities associated with the company’s alleged “failure” to comply with Section  
 9 162(m) are similarly inaccurate. For example, Avanir’s 2012, 2013, and 2014  
 10 proxy statements clearly state that “no covered executive’s compensation for  
 11 Section 162(m) purposes exceeded \$1.0 million” for each of fiscal years 2011,  
 12 2012, and 2013 (*i.e.*, the years at issue in the complaint). Ocampo Decl., Exs. F  
 13 [2012 Proxy at 30]; G [2013 Proxy at 32]; H [2014 Proxy at 41].

14 An even more fundamental issue, and one entirely ignored by plaintiff, is that  
 15 Avanir is currently unable to use federal tax deductions with respect to its equity  
 16 awards granted to *any employee* because of its significant net operating losses. *Id.* ¶  
 17 28. Avanir’s most recent Form 10-K disclosed significant net operating losses,  
 18 including a federal net operating loss carry-forward of \$407.4 million as of  
 19 September 30, 2013. *See* Ocampo Decl., Ex. I [FY 2013 Form 10-K, at F-33]. The  
 20 Form 10-K further noted that “[s]ince the Company has a net operating loss carry-  
 21 forward as of September 30, 2013, 2012, and 2011, no excess tax benefits for tax  
 22 deductions related to share-based awards were recognized in the accompanying  
 23 consolidated statements of operations.” *Id.* at F-16. Put another way, the company  
 24 is unable to utilize tax deductions related to *any* of its share-based awards because

25  
 26 <sup>11</sup> The 2014 Plan will expand the types of tax-deductible equity awards that the  
 27 Compensation Committee may grant to covered executives to include stock awards  
 28 (restricted stock and restricted stock units) and cash-based awards. 2014 Proxy at  
 14 (setting forth annual limits for purposes of Section 162(m)). Under the 2005  
 Plan, the Compensation Committee may currently grant tax-deductible stock  
 options to covered executives.



1 of the company's net operating losses. *Id.* ¶ 28.

2 Notwithstanding these clear disclosures regarding the tax status of Avanir's  
 3 equity award grants, plaintiff insinuates that the company's compensation-related  
 4 disclosures, including its Compensation Discussion & Analysis ("CD&A") in the  
 5 Proxy,<sup>12</sup> obfuscate the source of awards granted to covered executives to hide the  
 6 fact that the awards are not deductible under Section 162(m). The insinuation is  
 7 inaccurate and plaintiff's underlying point is irrelevant. The covered executives'  
 8 Forms 4 filed with respect to equity grants they received after Avanir's February  
 9 2011 annual meeting (*i.e.*, the meeting in which plaintiff alleges that Section  
 10 162(m) performance goals should have been reapproved) were made under the  
 11 company's 2003 Equity Incentive Plan (the "2003 Plan"), which expired by its  
 12 terms in March 2013. 2014 Proxy at 12. The 2003 Plan was not (and did not need  
 13 to be) approved by Avanir's shareholders<sup>13</sup> and awards granted to covered  
 14 executives under the plan are therefore not deductible under Section 162(m).  
 15 Avanir has never represented to its shareholders that awards granted under the 2003  
 16 Plan are deductible under 162(m) (Ocampo Decl. ¶ 5) and, in any event, the  
 17 deductibility of any such awards is irrelevant because the company is currently  
 18 unable to utilize tax deductions for any of its share-based compensation.<sup>14</sup> *Id.* ¶ 28.

19 <sup>12</sup> The purpose of the CD&A compensation tables is to inform shareholders of  
 20 the *amount* of compensation paid to a company's named executive officers during  
 21 each fiscal year. Plaintiff fails to explain why a disclosure that is required every  
 year and is unrelated to Proposal 4 should include information that Plaintiff alleges  
 should appear in Proposal 4.

22 <sup>13</sup> The company adopted the 2003 Plan prior to the Nasdaq listing requirements  
 23 that now require shareholder approval. *See, e.g.*, SEC Release No. 34-48108 (June  
 30, 2003) (setting forth the rules for shareholder approval of equity plans).

24 <sup>14</sup> Even if Avanir were able to use tax deductions for its equity grants under the  
 25 2003 Plan, it is under no legal obligation to do so. *Freedman*, 2012 Del. Ch.  
 26 LEXIS 74, at \*44-45. In light of the underlying facts, plaintiff's claim that Avanir  
 27 failed to disclose why it failed to seek shareholder re-approval of the 2005 Plan at  
 28 its 2011, 2012, or 2013 annual meetings (*e.g.*, to permit the Committee to grant  
 non-option equity awards to covered executives that would be deductible under  
 Section 162(m)) is easily addressed. The Committee did not grant any non-option  
 equity awards to its covered executives under the 2005 Plan following the  
 company's 2011 annual meeting and, more fundamentally, the company could not

1                               **2. Plaintiff Fails to Establish That Any of the Details He Wants**  
 2                               **to Disclose Are Material.**

3               Materiality is measured objectively: “An omitted fact is material if there is a  
 4 substantial likelihood that a reasonable shareholder would consider it important in  
 5 deciding how to vote .... Put another way, there must be a substantial likelihood  
 6 that the disclosure of the omitted fact would have been viewed by the reasonable  
 7 investor as having significantly altered the ‘total mix’ of information made  
 8 available.” *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 48 L. Ed. 2d  
 9 757, 96 S. Ct. 2126, 2132 (1976). This standard applies to Rule 14a-9 claims (*id.*)  
 10 and those involving the duty of disclosure under state law (*see Pfeffer v. Redstone*,  
 11 965 A.2d 676, 686 (Del. 2009)).

12               More disclosure is not tautologically better disclosure. The law does not  
 13 require companies to bury shareholders in “an avalanche of trivial information,”  
 14 because doing so is “hardly conducive to informed decision making.” *TSC Indus.*,  
 15 426 U.S. at 448-49. The law does not require that “all available information” be  
 16 provided. *In re Siliconix Inc., S’holders Litig.*, Civ. A. No. 18700, 2001 Del. Ch.  
 17 LEXIS 83, at \*36 (Del. Ch. June 19, 2001) (citation omitted). As the court in  
 18 *Clorox* recently observed, a finding that material information was withheld based  
 19 merely on the notion that the omitted information would have been helpful “would  
 20 be a license to file suit where *anything* was withheld, for any information can  
 21 always be labeled as potentially ‘helpful,’” but “Delaware law provides no such  
 22 license.” *Mancuso v. Clorox Co.*, No. RG12-651653 (Cal. Super. Ct. Aug. 21,

23 \_\_\_\_\_  
 24 (continued...)

25               have utilized any tax deductions for its share-based compensation paid during  
 26 those years even if it had sought shareholder approval for purposes of Section  
 27 162(m). Ocampo Decl. ¶¶ 14, 26. Plaintiff fails to explain why the company is  
 28 obligated to explain to its shareholders in the Proxy why it opted not to devote  
 valuable resources to seek shareholder approval for theoretical tax deductions.  
 Indeed, Avanir has spent more money defending against plaintiff’s specious claims  
 than the aggregate amount of tax deductions that it has lost under Section 162(m)  
 with respect to equity awards granted under the 2005 Plan: \$0. *Id.* at ¶ 27.

2013) (Statement of Decision (Tentative)), at \*17 (“*Clorox Decision*”); *see also* *Mancuso v. Clorox Co.*, No. RG12-651653 (Cal. Super. Ct. Sept. 24, 2013) (Notice of Entry of Judgment in Favor of Defendants).<sup>15</sup> Rather, plaintiff must demonstrate that the omitted information would have assumed actual significance in the deliberations of the reasonable stockholder. *See Strategic Diversity, Inc. v. Alchemix Corp.*, 666 F.3d 1197, 1207 (9th Cir. 2012).

Plaintiff nowhere attempts to establish materiality under this standard. Instead, he reflexively declares that, if analyses were presented to the Board, the information is material and a summary must be disclosed. This inaccurate axiom “is certainly not the law.” *Wayne Cnty. Emps.’ Ret. Sys. v. Corti*, 954 A.2d 319, 332 (Del. Ch. 2008). As the Delaware Court of Chancery has explained, “[N]ot every document reviewed by the board is material . . . . ‘Otherwise every book that’s given to the board and every presentation made to the board would have to be part of the proxy . . . .’” *Id.* (citation omitted). Further, the summary provided need not include every detail, the disclosure of which may only prove to be misleading rather than enlightening. *See TSC*, 426 U.S. at 448-49. Nor does the law require a company to disclose detailed information sufficient to enable shareholders to replicate the analysis performed by the company’s outside consultants. *See, e.g., Dias v. Purches*, Civ. A. No. 7199VCG, 2012 WL 4503174, at \*9 (Del. Ch. Oct. 1, 2012) (proxy need not disclose “underlying financial data that would allow the Plaintiff to make its own independent judgment as to the advisability of the merger”). Simply put, plaintiff’s demand for more disclosure amounts to “nothing more than an example of the ‘tell me more’ variety of disclosure claims” that routinely fail. *Freedman*, 2012 Del. Ch. LEXIS 74, at \*77.<sup>16</sup>

<sup>15</sup> Copies of the *Clorox Decision* and the *Clorox Notice of Entry of Judgment in Favor of Defendants* are attached as Exhibits C and D to the Biffar Decl.

<sup>16</sup> Professor Daines explains why this limitation is sensible as a practical matter: “[T]he net value of a stock incentive plan . . . involves complicated cost-benefit analysis and cannot properly be evaluated without specialized skill and

1 In any event, the Proxy does contain a thorough summary. The Proxy  
 2 explains that the Committee retained an outside consultant, Radford, an Aon Hewitt  
 3 Company (“Radford”), to help design a new compensation plan. 2014 Proxy at 30.  
 4 The Committee identified its peers in the market and analyzed other compensation  
 5 data that Radford provided. As disclosed in the Proxy, the Committee ultimately  
 6 reached the determination that “the availability of 17,000,000 shares would provide  
 7 a sufficient additional number of shares to enable the Company to continue to make  
 8 awards at historical average annual rates for the next four years.” *Id.* at 13.  
 9 Nothing more is required. The Proxy need not spell out the precise mathematical  
 10 calculations that Radford and the Committee employed in connection with arriving  
 11 at the 17 million figure. Including more detail for the sake of detail, rather than  
 12 adding clarity, actually would have the opposite effect by burying shareholders in  
 13 “avalanche of information” that would not be “conducive to informed  
 14 decisionmaking.” *TSC Indus.*, 426 U.S. at 448-49; *see also Skeen v. Jo-Ann Stores,*  
 15 *Inc.*, Civ. A. No. 16836, 1999 Del. Ch. LEXIS 193, at \*13-14 (Del. Ch. Sept. 27,  
 16 1999) (citation omitted), *aff’d*, 750 A.2d 1170 (Del. 2000). Courts “must ‘guard  
 17 against the fallacy that increasingly detailed disclosure is always material and  
 18 beneficial.’” *Abrons v. Maree*, 911 A.2d 805, 813 (Del. Ch. 2006) (citation  
 19 omitted).

20 SEC Chair, Mary Jo White, speaking in her personal capacity at a speech on  
 21 October 15, 2013, explained that while disclosure is generally a good thing, when it  
 22 “gets to be ‘too much’ or strays from its core purpose, it could lead to what some  
 23 have called ‘information overload’—a phenomenon in which ever-increasing  
 24 amounts of disclosure make it difficult for an investor to wade through the volume

25  
 26 (continued...)

27 access to detailed (and often confidential) information about employee  
 28 compensation that shareholders do not possess. It would be impractical to share  
 with shareholders all the knowledge and data necessary to complete this analysis.”  
 Daines Decl. ¶ 55.

1 of information she receives to ferret out the information that is most relevant.”<sup>17</sup>  
 2 Ms. White singled out disclosures on executive compensation as a particular  
 3 concern. *Id.* She observed that, “companies have decided to more fully explain to  
 4 their shareholders the rationale and considerations for these compensation  
 5 decisions. And we think these additional disclosures are a good thing, but we  
 6 should be careful not to have too much of a good thing.” *Id.*

### 7 **3. Much of the Information Sought By Plaintiff is Already** 8 **Disclosed in the Proxy or in the Public Domain**

9 Companies are not required to disclose facts that are “known or reasonably  
 10 available to the stockholder.” *Meyer v. Alco Health Servs. Corp.*, Civ. A. No.  
 11 11213, 1991 Del. Ch. LEXIS 10, at \*10 (Del. Ch. Jan. 17, 1991); *see also In re*  
 12 *Micromet, Inc. S’holders Litig.*, Civ. A. No. 7197-VCP, 2012 Del. Ch. LEXIS 41,  
 13 at \*36-37 (Del. Ch. Feb. 29, 2012) (no duty to disclose where “any investor who  
 14 desired to know . . . could find this information in [the Company’s] publicly-filed  
 15 Form 13F”). It necessarily follows that when information is “obvious to anyone  
 16 conversant with elementary mathematics,” there is no duty under the federal  
 17 securities laws to disclose it. *Data Probe Acquisition Corp. v. Datatab, Inc.*, 722  
 18 F.2d 1, 5 (2d Cir. 1983). Because such information is publicly available, it cannot  
 19 be said to alter the “total mix of information already available.” *In re Gen. Motors*  
 20 *(Hughes) S’holder Litig.*, Civ. A. No. 20269, 2005 Del. Ch. LEXIS 65, at \*68 (Del.  
 21 Ch. May 4, 2005), *aff’d*, 897 A.2d 162 (Del. 2006). In other words, a shareholder  
 22 cannot act like an “ostrich, hiding her head in the sand from relevant information . .  
 23 . .” *Greenhouse v. MCG Capital Grp.*, 392 F.3d 650, 656-57 (4th Cir. 2004).

#### 24 **(a) Shareholder Dilution**

26  
 27 <sup>17</sup> Mary Jo White, Chairwoman, SEC, Remarks at Nat’s Ass’n of Corp.  
 28 Directors Leadership Conference 2013: The Path Forward on Disclosure (Oct. 13,  
 2013), (available at <http://www.sec.gov/News/Speech/Detail/Speech/1370539878806>).

1 Plaintiff complains that the Proxy does not adequately explain the dilutive  
 2 impact<sup>18</sup> that purportedly will result if Proposal 4 is approved and all of the shares  
 3 authorized under the 2014 Plan are issued. Pl. Mem. at 7-8, 15. Plaintiff is wrong.  
 4 The Proxy expressly states that a maximum of 17 million of shares of stock may be  
 5 issued under the 2014 Plan, which would be 11.2% of the stock outstanding (*i.e.*,  
 6 the dilution that would be represented by equity awards granted under the proposed  
 7 plan). 2014 Proxy at 13; *see also* Daines Decl. ¶¶ 18, 21.

#### 8 (b) “Overhang”

9 Plaintiff claims that Avanir should disclose more fully the “overhang,” which  
 10 refers to the amount of potential dilution in the value of currently held shares that  
 11 could result from future issuance of reserved shares. Pl. Mem. at 7-8. However,  
 12 shareholders can readily calculate “overhang” based on numbers that Avanir has  
 13 already disclosed. For example, page 13 of the Proxy states that as of December  
 14 13, 2013, Avanir had 12,482,398 shares subject to outstanding awards. The Proxy  
 15 also discloses the total outstanding shares as 152,111,721. 2014 Proxy at 1.  
 16 Accordingly, current overhang—shares subject to outstanding awards (12,482,398)  
 17 divided by total shares outstanding (152,111,721)—is 8.2%. This is a matter of  
 18 simple math. *See also* Daines Decl. ¶¶ 19, 21.

#### 19 (c) “Burn Rate”

20 Plaintiff also alleges that Avanir does not disclose its “burn rate.” Again,  
 21 such information easily can be calculated. “Burn rate” is a measure of the speed at  
 22 which a company uses (or “burns”) shares available for grant under its equity  
 23 compensation plans. Pl. Mem. at 7-8. It is unclear whether plaintiff believes that  
 24 Avanir should have disclosed its historical burn rate or projected the expected burn

25  
 26 <sup>18</sup> As Professor Daines makes clear (Daines Decl. ¶¶ 43-48), there are several  
 27 possible meanings of the phrase “dilutive impact,” and plaintiff has not made clear  
 28 what he means by the term. For purposes of this brief, defendants assume that  
 plaintiff is referring to the impact on the value of any single share of Avanir stock  
 that may be caused by the issuance of additional shares under equity compensation  
 plans.



1 rate under the 2014 Plan. A claim does not arise under either definition.

2       Avanir's burn rate for the past three years easily can be derived from  
3 information that Avanir has disclosed in the Proxy and its most recent Form 10-K.  
4 By dividing the total number of shares subject to equity awards granted during a  
5 fiscal year (2014 Proxy at 13) by the weighted average number of shares  
6 outstanding during the fiscal year (FY 2013 Form 10-K at 34), one can calculate  
7 simple burn rates for fiscal years 2011, 2012, and 2013 as 2.51%, 2.63%, and  
8 2.18%, respectively. *See also* Daines Decl. ¶¶ 20-22 tbl. 1. The securities laws do  
9 not require companies to disclose every possible metric or statistic that could be  
10 easily calculated from the raw data the company has supplied to the investing  
11 public. *See Data Probe*, 722 F.2d at 5 (finding no duty under federal securities law  
12 to disclose information "obvious to anyone conversant with elementary  
13 mathematics").

14       As for the company's future burn rate, this would be pure speculation, as the  
15 Committee retains discretion over what awards to make. 2014 Proxy at 13 ("The  
16 2014 Plan is administered by our Compensation Committee, who has the authority  
17 to, among other things, . . . determine eligibility for, grant and determine the terms  
18 of awards under the 2014 Plan . . ."). Nor is Avanir required to disclose  
19 projections the company or its consultants may have developed to estimate the  
20 amount of stock that might be awarded. Given the discretionary nature of the 2014  
21 Plan, any projection might prove misleading rather than enlightening. *See, e.g.,*  
22 *Gordon v. Symantec*, No. 1-12-CV-231541, 2013 WL 657791 (Cal. Super. Ct. Jan.  
23 22, 2013); *Mancuso v. Clorox Co.*, No. RG12-65163, 2012 WL 5874640, at \*1  
24 (Cal. Super. Ct. Nov. 13, 2012) (refusing to enjoin shareholder vote on  
25 compensation plan where plaintiff failed to show materiality of information omitted  
26 from proxy); *In re Checkfree Corp. S'holder Litig.*, Civ. A. No. 3193-CC, 2007  
27 Del. Ch. LEXIS 148, at \*11 (Del. Ch. Nov. 1, 2007).

1 **(d) Criteria for Issuing Stock Appreciation Rights and**  
 2 **Restricted Stock Units**

3 Plaintiff alleges that the Proxy omits the criteria the Committee relied upon  
 4 when issuing stock appreciation rights or restricted stock. Pl. Mem. at 8, 15. It is  
 5 difficult to discern what plaintiff is alleging here, as the company has not made any  
 6 such grants under the 2014 Plan. Presumably this claim refers to the contingent  
 7 restricted stock units (RSUs) granted to covered executives under the 2014 Plan in  
 8 December 2013 and disclosed to shareholders in the Proxy. 2014 Proxy at 18.  
 9 Plaintiff does not cite to any authority that would require Avanir to disclose the  
 10 criteria it considered in granting individual equity awards. Assuming plaintiff's  
 11 allegation relates to prospective grants that the company may make under the plan,  
 12 as the Proxy makes clear, the Committee retains discretion to determine the  
 13 applicable terms. 2014 Proxy at 14.

14 **4. Plaintiff's Additional Metrics**

15 Drilling deeper, plaintiff argues that even greater detail should be provided in  
 16 the form of additional information regarding certain figures that can be discerned  
 17 from information that is already publicly available. Plaintiff's arguments for  
 18 mandatory disclosure of each of these items make little sense.

19 **(a) "Burn Rate" Comparison**

20 Plaintiff argues that with respect to Avanir's burn rate, the Proxy must  
 21 disclose that Avanir's three year average burn rate is 2.74% as compared to the  
 22 Industry Mean of 3.84% and the ISS Burn Rate Limit of 6.70%. Plaintiff's  
 23 Supplement in Support of Memorandum of Law in Support of Plaintiff's Motion  
 24 for Preliminary Injunction ("Pl. Supp. Mem."), Dkt. No. 16, Jan. 30, 2014, at 4.  
 25 Ironically, this comparison makes Avanir's 2014 Plan look even more favorable  
 26 (not less), in that the burn rate is below (not above) these two benchmarks. It  
 27 certainly would not cause shareholders to question the 2014 Plan, nor would it  
 28 substantively alter the "total mix" of information available to them.



**(b) Testing of CEO Pay-for-Performance Relative to Returns**

Plaintiff claims Avanir must disclose ISS's testing of CEO Pay-for-Performance relative to the Company's 1-year and 3-year shareholder returns. *Id.* As noted in the Radford materials, ISS may recommend a "no" vote for a company's equity plan proposal if ISS determines that the company's level of pay to its CEO is misaligned. Declaration of David E. Bower in Support of Plaintiff's Motion for a Preliminary Injunction ("Bower Decl."), Dkt. No. 16-1, Jan. 30, 2014, Ex. B at 3, 7. In so arguing, plaintiff misses the most important point: Radford concluded that Avanir would likely pass ISS's test with a "low" level of concern and ISS actually has supported the 2014 Plan. *Id.*

**(c) Shareholder Value Transfer Analysis**

Plaintiff argues that Avanir must disclose Radford's shareholder value transfer (SVT) analysis showing the share value with overhang. As a threshold matter, Radford calculated this information using ISS's proprietary SVT modeling tool. *Id.* at 1. Even assuming that Avanir could disclose ISS's proprietary information, this is purely an internal proprietary ISS metric that the proxy advisory firm uses for its own purposes. That is the very type of minutiae that is *subject to change* and *not* required to be disclosed. *See, e.g., Ryan v. Lyondell Chem. Co.*, No. 3176-VCN, 2008 WL 2923427, at \*19 n.115 (Del. Ch. July 29, 2008), *rev'd on other grounds*, 970 A.2d 235 (Del. 2009); *Solomon v. Armstrong*, 747 A.2d 1098, 1130 (Del. Ch. 1999).

**5. Professor Daines Explains Why the Details Plaintiff Seeks Are Immaterial**

In contrast to the absence of expert testimony from the plaintiff, Avanir has submitted a comprehensive declaration by Professor Daines of Stanford Law School. Professor Daines, whom the SEC has retained as an expert on the materiality of public disclosures, opines that the disclosures plaintiff seeks here are

1 not material to a reasonable shareholder. He shows that none of the information  
 2 that plaintiff claims is missing from the Proxy would be material to a reasonable  
 3 shareholder in deciding how to vote on Proposal 4. Daines Decl. ¶¶ 11-12, 14-16,  
 4 24-31. Professor Daines's analysis is based on a thorough empirical analysis of the  
 5 proxy disclosures of many companies similar to Avanir that have recently  
 6 shareholder approval for new stock option plans.

7 Professor Daines first notes that "[a] set of practices, customs or standards  
 8 have emerged about how much detail is appropriate in an annual proxy," and that  
 9 these customs reflect a "collective professional judgment ... about the kind of  
 10 information that is valuable to investors." *Id.* ¶ 24. Economic theory dictates that  
 11 companies will disclose important information because if they do not, they may  
 12 find it hard to raise money. *Id.* As a result, "one good way to tell whether  
 13 additional details are actually important is to see whether or not they are included in  
 14 a significant number of proxies for similar companies. If not, this reflects a  
 15 collective judgment that these details are not important." *Id.* ¶ 25.

16 Professor Daines systematically compared the disclosures in the Avanir  
 17 Proxy to the proxy disclosures of twenty-five companies that are similar in size to  
 18 Avanir and have requested shareholder approval of an equity incentive plan. *Id.* ¶¶  
 19 26-28, tbls. 2-3. He found that most of the peer companies did not disclose the kind  
 20 of information that plaintiff seeks here and *not one* of the peer companies disclosed  
 21 all of the information plaintiff seeks. *Id.* ¶ 29 tbl. 3. In fact, Avanir's disclosures  
 22 were consistent with disclosures made by similar companies in the areas about  
 23 which plaintiff complains. *Id.* ¶ 29. Specifically, no other peer company disclosed  
 24 more than Avanir about expected overhang, only 28% disclosed more about burn  
 25 rate, and only 12% disclosed more about the criteria for awarding future grants. *Id.*  
 26 ¶ 29 tbl. 3. With respect to plaintiff's claim that Avanir should disclose a summary  
 27 of a burn rate and overhang analysis performed by an outside consultant (Pl. Supp.  
 28 Mem. at 3-4), Professor Daines found that *only one of the twenty-five peer*

1 *companies disclosed such a summary. Id.*

2 From these facts, Professor Daines concludes that “[i]ndustry standard and  
3 practice reflect a judgment that the requested information about the 2014 Plan is not  
4 important to shareholders,” because if it were important, the industry practice  
5 would be to disclose such information. *Id.* ¶ 30.

6 Professor Daines’s analysis is supported by the actions of two groups of  
7 independent actors—proxy advisory firms and securities analysts—who make a  
8 living by examining thousands of corporate disclosures in general and proxy  
9 materials in particular, in order to advise investors. As Professor Daines notes, (*id.*  
10 ¶¶ 35-36; Biffar Decl., Exs. H-I), two of the country’s leading proxy advisory firms,  
11 ISS and Glass Lewis,<sup>19</sup> analyzed Avanir’s Proxy and issued reports recommending  
12 that shareholders vote in favor of Proposal 4. These firms often favor broader  
13 voluntary disclosure than the securities law require (Daines Decl. ¶ 35), and their  
14 approval is therefore notable. In its analysis, Glass Lewis states, “we find no  
15 significant reason for shareholder concern regarding the material terms of the  
16 proposed plan.” Biffar Decl., Ex. I at 15; *see also* Daines Decl. ¶ 36. Similarly,  
17 ISS noted that a vote for Proposal 4 is warranted, in part because “[t]he shareholder  
18 value transfer appears to be within a reasonable range,” and “[t]he equity burn rate  
19 is reasonable.” Biffar Decl., Ex. H at 17; *see also* Daines Decl. ¶ 36.

20 Professor Daines also reviewed the reports of each of the three securities  
21 analyst firms that covered Avanir during the time that the Proxy was published.  
22 Professor Daines concluded that *not a single analyst* called for the disclosures

23  
24 <sup>19</sup> ISS maintains an experienced research team of analysts and data professionals  
25 that provide comprehensive proxy analyses and complete vote recommendations for  
26 more than 40,000 meetings in over 100 markets worldwide. Institutional  
27 Shareholder Services, <http://www.issgovernance.com/proxy/advisory> (last visited  
28 Feb. 5, 2014). Similarly, Glass Lewis is the leading independent governance  
analysis and proxy voting firm and serves institutional investors globally that  
collectively manage more than \$15 trillion in assets. Glass Lewis & Co.,  
<http://www.glasslewis.com/about-glass-lewis/> (last visited Feb 5, 2014). True and  
correct copies of the reports and recommendations of ISS and Glass Lewis  
regarding Avanir’s 2014 Proxy are attached to the Biffar Decl. as Exhibits H and I.

1 plaintiff seeks here or even discussed the allegedly necessary information. Daines  
 2 Decl. ¶¶ 32-34. Importantly, no proxy advisory firm, securities analyst, or anyone  
 3 else has publicly recommended voting against Proposal 4, and no one other than  
 4 plaintiff has suggested that Avanir's Proxy disclosures are lacking in any respect.

### 5 **6. Courts Have Consistently Refused to Require Additional** 6 **Disclosures Relating to Compensation Plans**

7 Courts overwhelmingly have rejected the need for the type of disclosures that  
 8 plaintiff seeks here. An injunction here only would serve to heighten the  
 9 uncertainty that companies face in deciding what information to disclose regarding  
 10 incentive compensation.

11 Plaintiff's attorneys have filed approximately twenty-two cases seeking to  
 12 enjoin shareholder votes on issues relating to compensation or equity plans,  
 13 according to publicly available litigation resources. *See* Cases, Faruqi & Faruqi  
 14 LLP, <http://www.faruqilaw.com/cases/allCases> (last visited Feb. 5, 2014). After  
 15 one early plaintiff's victory, *Knee v. Brocade Commc's Sys. Inc.*, Case No. 1-12-  
 16 CV-220249 (Cal. Super. Ct. Apr. 10, 2012),<sup>20</sup> and several settlements prior to a  
 17 court ruling on the plaintiff's preliminary injunction motion, courts in California  
 18 and elsewhere have refused to enjoin shareholder votes on matters relating to  
 19 compensation or equity plans. *See Clorox*, 2012 WL 5874640; *Symantec*, 2013  
 20 657791; *Morrison v. Hain Celestial Grp.*, No. 602074/2012 (N.Y. Super. Ct. Nov.  
 21 14, 2012); Transcript of Hearing on Motion for TRO, *Noble v. AAR Corp.*, No.  
 22 1:12-CV-07973 (N.D. Ill. Oct. 9, 2012); *Rice v. Ultratech*, No. 1-12-CV-226520  
 23 (Cal. Super. Ct. Jul. 16, 2012).<sup>21</sup>

24 The reasoning in *Brocade*, on which plaintiff so heavily relies, does not  
 25 apply. In *Brocade*, the plaintiff sought disclosure of specific projections the board

26 <sup>20</sup> A copy of the *Brocade* decision can be found at Exhibit C to the Declaration  
 27 of David E. Bower filed on January 20, 2014 (Dkt. No. 16-2).

28 <sup>21</sup> To the extent a written order was issued, copies of the unpublished decisions  
 referenced are attached as Exhibits E – G to the Biffar Decl.

1 relied on when it decided to seek approval for 35 million shares. The court only  
2 held that shareholders are entitled to “generally understand” these projections and  
3 how and why the board came to its numbers. Bower Decl., Ex. C at 100. By  
4 contrast, Avanir’s Proxy does contain a projection that lets shareholders “generally  
5 understand” how the Board arrived at its numbers. The Avanir Proxy states that in  
6 fiscal 2011, 2012, and 2013, the Company made equity awards under its existing  
7 equity incentive plans totaling approximately 2,993,888 shares, 3,501,642 shares,  
8 and 3,095,910 shares, respectively. 2014 Proxy at 13. The Avanir Proxy also  
9 states that, as of December 13, 2013, Avanir had only 191,126 shares available for  
10 future awards. *Id.* Finally, the Avanir Proxy states that “the availability of  
11 17,000,000 shares would provide a sufficient additional number of shares to enable  
12 the Company to continue to make awards at historical average annual rates for the  
13 next four years.” *Id.* Thus, the Proxy already provides exactly what the *Brocade*  
14 court held that Brocade’s Proxy should have disclosed: an explanation of how and  
15 why the Board arrived at its number of proposed additional shares. It is difficult to  
16 imagine (and plaintiff does not explain) how disclosing still more information  
17 would plausibly take on “actual significance” in the mind of a reasonable  
18 stockholder or significantly alter the “total mix” of information.

19 The recent *Clorox* decision illustrates the trend of courts refusing to broaden  
20 the scope of the types of information companies are required to disclose related to  
21 incentive compensation plans. After denying the plaintiff’s motion for preliminary  
22 injunction to enjoin the shareholder vote, the court held that the company did not  
23 omit any material information, and made specific findings with respect to the  
24 information Plaintiff sought to disclose. *Clorox* Decision at 8-17. Similar to  
25 plaintiff’s claims here, the plaintiff argued that Clorox was required to disclose a  
26 summary of a number of reports and analyses given to and considered by Clorox’s  
27 compensation committee. *Id.* at 2, 8-16. With respect to each piece of information,  
28 the court rejected the plaintiff’s argument, finding that such information (which

1 included peer group, CEO Pay-for-Performance, and fair value transfer analyses)  
 2 would not significantly alter the total mix of information. *Id.* at 8-16. The court  
 3 concluded by observing that the plaintiff had “simply discovered what additional  
 4 information was presented to [Clorox’s compensation committee] and not included  
 5 or summarized completely in the Proxy and then described why such information  
 6 would be ‘helpful.’” *Id.* at 17. That is exactly what plaintiff has done.

7 **D. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST**  
 8 **WEIGH IN DEFENDANT’S FAVOR**

9 Plaintiff would not suffer any harm if the shareholder vote on Proposal 4  
 10 were allowed to proceed. On the other hand, if the Court enjoins the shareholder  
 11 vote on Proposal 4, Avanir, its shareholders, and other public companies would  
 12 suffer significant harm. *First*, enjoining the shareholder vote would threaten the  
 13 availability of shares with which to compensate Avanir employees. As noted  
 14 above, as of December 13, 2013, there remained 191,126 shares available for  
 15 issuance under the 2005 Plan. These shares are insufficient to provide the equity  
 16 component of the company’s employee compensation for the foreseeable future,  
 17 given the company’s recent historical burn rates above 3 million shares a year.  
 18 Moreover, if the company is unable to compensate its employees with equity, it  
 19 would be forced to reallocate its crucial cash reserves to compensation, which  
 20 would undermine its goal of reaching profitability.

21 *Second*, a ruling that a public company must disclose additional detailed  
 22 information that custom and practice shows shareholders do not value would have  
 23 far-reaching implications, not only for Avanir but for all public companies and their  
 24 shareholders. As Professor Daines explains, there is a cost to additional  
 25 disclosures, and a new requirement for detailed information would also introduce  
 26 uncertainty about the need to disclose a broad range of additional information about  
 27 many company-wide decisions. Daines Decl. ¶ 53. Allowing the vote to proceed  
 28 will communicate to companies such as Avanir that courts will honor directors’



1 good faith business judgments and protect them against predatory lawsuits, whereas  
 2 granting an injunction will leave companies at the mercy of a single shareholder  
 3 who wishes to replace the board's decisionmaking with his own.

4 *Third*, the company would incur significant unnecessary expenses if it were  
 5 required to schedule a new shareholder meeting, issue an amended proxy, and hold  
 6 another vote on Proposal 4. *See* Ocampo Decl. ¶¶ 41-48. In addition to the "hard"  
 7 costs involved, a tremendous amount of time would be expended by directors and  
 8 officers that could better be directed at company business.

#### 9 **IV. BOND REQUIREMENT**

10 Rule 65(c) of the Federal Rules of Civil Procedure provides that a "court may  
 11 issue a preliminary injunction or a temporary restraining order only if the movant  
 12 gives security in an amount that the court considers proper," and that it may be  
 13 reversible error to issue an injunction without such security. *Hoechst Diafoil Co. v.*  
 14 *Nan Ya Plastics Corp.*, 174 F.3d 411, 421 (4th Cir. 1999). As detailed in the  
 15 Declaration of Christine G. Ocampo, filed concurrently herewith, the injunctive  
 16 relief plaintiff seeks will result in financial and practical harm to Avanir. Ocampo  
 17 Decl. ¶¶ 41-48. Thus, if the Court were to issue such an injunction, a bond of no  
 18 less than \$137, 205.86 should be required.

#### 19 **V. CONCLUSION**

20 Plaintiff's motion for a preliminary injunction should be denied.

21 Dated: February 5, 2014

Respectfully submitted,

22 JONES DAY

23  
 24 By: /s/ Travis Biffar  
 25 Travis Biffar

26 Attorneys for defendants